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No. 00-

IN THE

# Supreme Court of the United States

ADVANCE LEASING AND DEVELOPMENT, INC., PETER A. GERACI and ROY N. GERACI,

*Petitioners*,

*v.*

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, JOSEPH CHILLURA, in his official capacity as a Commissioner of Hillsborough County, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the Eleventh Circuit's after-the-fact, hypothetical consideration of *any conceivable* justification for a local government's zoning denial, at summary judgment *without trial by jury*, conflicts with this Court's requirement of a jury trial to examine the *reasonableness* of the local government's *proffered* justifications, as established in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999) ("*Del Monte Dunes*").

Whether the Eleventh Circuit's refusal to recognize a due process takings claim is in direct conflict with this Court's decision in *Del Monte Dunes* which expressly holds that a due process takings claim is cognizable under 42 U.S.C. § 1983.

## PARTIES TO THE PROCEEDING

Petitioners are Advance Leasing and Development, Inc., a Florida Corporation, Peter A. Geraci and Roy N. Geraci.

Respondents are Hillsborough County through its Board of County Commissioners, and the Department of Community Affairs of the State of Florida.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner, Advance Leasing and Development, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

## OPINIONS BELOW

The opinions of the Court of Appeals and District Court are unreported but are included herein at Appendix A and Appendix B.

## STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 19, 2000, sustaining a Summary Judgment in favor of Respondents entered by the United States District Court for the Middle District of Florida on September 21, 1998. The Court of Appeals subsequently entered an order denying a petition for rehearing and petition for rehearing en banc on July 24, 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves substantive due process, equal protection and due process takings claims framed within the context of 42 U.S.C. § 1983.

The Fourteenth Amendment to the United States Constitution, Section 1, states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

> of the United States; nor shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

This case involves a federal constitutional and statutory attack, by the landowners and proposed developer, upon Hillsborough County's refusal to grant rezoning and development order approval which would have enabled Petitioners to construct a regional shopping mall upon property in Hillsborough County, Florida, *after the land*

*already was approved* by the County and the State of Florida *for regional commercial land use* pursuant to state and local law governing Comprehensive Land Use Plans. Petitioners were denied trial by jury when summary judgment was entered against them by the District Court. During the Petitioners' appeal to the Eleventh Circuit, this Court rendered *Del Monte Dunes, supra*. Petitioners brought *Del Monte Dunes* to the attention of the Eleventh Circuit, via notice of supplemental authority and during oral argument, and emphasized that *Del Monte Dunes* effectively overruled numerous Eleventh Circuit decisions and compelled a reversal of the summary judgment entered by the District Court in this case. The Eleventh Circuit disregarded this authority in affirming the summary judgment, and did not revisit its numerous decisions in conflict with *Del Monte Dunes, supra*, despite Petitioners' request to do so.

Peter A. Geraci and Roy N. Geraci, Jr. (the "Geracis") are second generation owners of the land in question. In May of 1988, the Geracis entered into a contract to sell Forbes-Cohen Development Corporation ("Forbes-Cohen"), a national mall developer, a portion of the Geraci land for the development of a regional shopping mall. The purchase was contingent upon receiving developmental approval from applicable governmental authorities. Pursuant to Florida law, Forbes-Cohen filed an application for development approval ("ADA") with the Tampa Bay Regional Planning Council for a development of regional impact ("DRI"), and a related application with Hillsborough County, for the rezoning of the mall site. The Forbes-Cohen application also included a request for Hillsborough County to amend the Comprehensive Plan *land use* designation on the Geraci land from agricultural to regional commercial (R/C), which would allow the retail mall use.

On January 5, 1989, Hillsborough County *adopted* a Comprehensive Plan *land use* designation of regional commercial (R/C) expressly for the Geraci land, *which allowed* the type of regional mall requested by Forbes-Cohen. Moreover, in December of 1989, the County created a North Dale Mabry Corridor Plan that specifically designated the Geraci land as a "major activity center," which contemplated its use as a regional mall. Forbes-Cohen then assigned its contract and development rights to Advance Leasing and Development, Inc. ("Advance Leasing") (Advance Leasing and the Geracis are collectively referred to as "Petitioners"). Advance Leasing filed an updated ADA for the mall site on February 28, 1992, and filed its own rezoning application, seeking *rezoning* approval *consistent with* the regional commercial (R/C) *land use* designation previously adopted by the County and approved by the State.[1]

As precisely was the case in *Del Monte Dunes*, the County over a five-year period repeatedly imposed conditions and exactions upon Petitioners at each stage of the approval process. Each time, as in *Del Monte Dunes*, the Petitioners capitulated and agreed to the condition or exaction. Ultimately, the Petitioners satisfactorily addressed

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1. In Florida, there are two levels of approval for use of land: (1) the land use designation, which is the planning category regulated by each county's Comprehensive Plan under Chapter 163, Fla. Stat., and reviewed by the Florida Department of Community Affairs, which establishes permissible density of use; and (2) the site-specific zoning category which is an overlay that must fall within the density parameters of the underlying land use designation. The approved Comprehensive Plan land use designation typically will allow any of several, more specific, zoning uses on a given piece of property. In this case, the regional commercial (R/C) land use already approved for the Geraci land expressly allowed the zoning category requested for a regional mall.

all potential issues related to the development order and rezoning application: wetlands, upland habitat protection, storm water management, traffic management and access, public water and wastewater, parking, well field impact, public transportation, and all other developmental issues raised by the various government agencies. All twenty-six review agencies having jurisdiction, *other than Hillsborough County* (whose own expert staff recommended approval), finally recommended approval of the project.

After extensive negotiations with County staff, the staff of the Hillsborough County City-County Planning Commission ("Planning Commission"), and the other governmental bodies, Petitioners brought their rezoning application before a Zoning Hearing Master ("ZHM") designated by the County, who recommended denial despite Petitioners' concession on every point, and notwithstanding the recommendation for approval by all other review agencies. Following the ZHM hearing, Petitioners continued to negotiate with the County and Planning Commission staffs, again capitulating to the additional demands of government, many of which went far beyond what was reasonable or rational or legal.[2] During this process, Petitioners also participated in negotiations with the County to resolve a challenge by the Sierra Club to the regional commercial (R/C) Comprehensive Plan land use designation for the Geraci land previously adopted for the Geraci land. These negotiations resulted in an agreement among all parties (the County, the Sierra Club, and the State) for a specific land use designation that would allow the construction of a

2. For purposes of this Petition, the details necessarily are omitted. This case, however, is factually on all fours with *Del Monte Dunes*. The only (non-material) difference is the Geraci land had Sherman fox squirrels, instead of Smith's Blue butterflies.

regional mall of the magnitude proposed by the Petitioners. This settlement agreement was adopted in a Final Order on December 16, 1993, following a specially scheduled public hearing before the Governor and Cabinet of the State of Florida sitting as the Administrative Commission ("Final Order"), pursuant to Florida law.

Also on December 16, 1993, over five years after Forbes-Cohen had first applied to develop the Geraci land, the Geracis' zoning application finally was presented to the Hillsborough County Board of County Commissioners ("Board"). By this date, the Geracis had already agreed to dedicate a conservation area within the project that was not legally required, had agreed to preserve wetlands, had agreed to make numerous, substantial transportation improvements, and otherwise had capitulated on every condition or exaction demanded by Hillsborough County. By then, the Petitioners also had received approval of all twenty-six regional and state review agencies as well as approval of the Hillsborough County staff and the staff of the Planning Commission. At the time of the Board meeting, Petitioners sought approval of a mall project that would allow development of 1.28 million square feet of retail use and 235,000 square feet of office use (due to the County's insistence that the Geracis' "outparcels" be added to the mall DRI project, to which demand the Geracis of course agreed), for a total development of 1,515,000 square feet. Both the retail and the office uses specifically were authorized by the R/C land use designation *already approved* by the County *and* by the terms of the Final Order of the Governor and Cabinet. Standing before the Board for final approval of the zoning and development order, however, the Petitioners ran headlong into harsh opposition by a well-organized, vocal, and politically-active group of residents. At this hearing,

notwithstanding the approval of all the reviewing agencies, their own staff, the Planning Commission staff, and the Final Order, the Board succumbed to the wishes of this politically powerful group of residents and refused to grant Petitioners the rezoning and development order necessary to construct an economically viable mall project.

At the same hearing, the Board then unilaterally stated the only conditions upon which it would again consider approving the project. Although Petitioners were (and are) convinced that they were constitutionally entitled to approval of the project presented to the Board on December 16, 1993, and without waiving their rights to the entire project, Petitioners continued to negotiate with the County and Planning Commission staff, to meet the Board's newest conditions. Subsequently, County staff concluded that Petitioners had substantially complied with all of the additional requests and conditions set forth by the Board and again recommended approval. On March 29, 1994, the revised site plans that had been negotiated with the staff in accordance with the Board's direction were represented to the Board. Again, the Board rejected the Petitioners' concession, with one Commissioner expressing her refusal to consider any approval if the Petitioners were "unwilling to put anything into [the public] trust fund."[3] On May 2,

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3. This was in direct response to the request of the citizen activist group which was demanding that the land not be developed and instead be set aside in a public trust. The Board meeting transcript recites Commissioner Busansky:

> But when we are talking about a conservation easement or when we are talking about protecting open space that's there, we're talking about putting this land in something

(Cont'd)

1994, the Board formally rendered its denial resolution for the rezoning. Moreover, on October 27, 1994, Hillsborough County, in contravention of the Final Order, unilaterally changed the *land use* designation for the Geraci land in a manner which would forever preclude the development proposed by the Petitioners, and would prohibit any development exceeding 650,000 square feet of retail space, a size that the Petitioners contend was economically unviable, as a regional mall, and well below the regional commercial threshold previously approved by the County and the State for the Geraci land.

Finally weary and now painfully aware that the County expected them to donate their land to a "public trust" without compensation, on January 18, 1995, Petitioners sued Hillsborough County and the Department of Community Affairs[4] in the United States District Court for the Middle

(Cont'd)

> like a trust fund. That's what is. That's what it is — just one minute — that's what it is to me. And we are saying "this is our trust fund." And this is our trust fund for that community. And to be so absolutely, adamantly opposed to setting that aside like that just makes me . . . uncomfortable. . . . And I would like to add, in fact, when you come back. If this motion is voted on, that you come back with some kind of discussion about how you want to deal with this. *Because I'm not going to deal with it if you are unwilling to put anything into that trust fund.* That's just where I'm coming from.

(Emphasis added).

4. Although Jan Smith, a member of the Planning Commission, was originally sued in her individual capacity for her participation with the citizen activist group, she, as well as the Planning Commission, itself, was voluntarily dismissed from the case on June 4, 1998. The Department of Community Affairs was made a party solely to enforce the Final Order of the Governor and Cabinet against the County.

District of Florida, alleging that the County violated 42 U.S.C. § 1983 in numerous respects and seeking declaratory and injunctive relief as well as damages and attorney's fees. Petitioners also brought state law claims for equitable estoppel and breach of contract. On April 13, 1998, the Department of Community Affairs filed a Motion for Summary Judgment and on September 22, 1998, Petitioners filed a Motion for Summary Judgment on the breach of contract count. On July 15, 1998, Hillsborough County filed its Motion for Summary Judgment. On September 21, 1998, the Honorable Henry Lee Adams, United States District Judge, granted the Respondents' Motions for Summary Judgment and denied Petitioners' Motion. The District Court based its decision solely on the Eleventh Circuit precedent that now directly conflicts with this Court's decision in *Del Monte Dunes*, as to the substantive due process, equal protection, and due process takings claims.

## REASONS FOR GRANTING THE WRIT

### I.

### THIS COURT HAS LIMITED THE DISTRICT COURT'S DEFERENCE IN EXAMINING LAND-USE DENIALS IN A MANNER THAT FUNDAMENTALLY CONFLICTS WITH THE "HYPOTHETICALLY POSSIBLE" PRECEDENT ESTABLISHED IN THE ELEVENTH CIRCUIT (AND OTHERS) AND APPLIED IN THIS CASE.

In *Del Monte Dunes, supra*, this Court reaffirmed the right of every citizen of the United States to protect their Constitutionally guarded property rights from the arbitrary and capricious action of local governments, affirming the right of each citizen to a jury trial to review the merits of a

land use denial. This Court further recognized that the right to a jury trial would only be meaningful if the citizen could attack, and the local government had to defend, the proffered rationale for the government's denial of property use on the basis of the government's recorded reasons given for the denial.[5] Yet the law of the Eleventh Circuit, applied in the case *sub judice*, denies the property owner a jury trial on the claim that the local government's conduct was arbitrary and capricious; moreover, the Eleventh Circuit precedent allows the trial or appellate court to sustain the conduct of the local government upon the hypothecation *by the court* of any grounds for which the actions *could have been taken*, whether the local government actually considered the reason or not. In *Del Monte Dunes*, this Court sustained a judgment for damages after a jury trial based on legally identical facts to the case *sub judice*; here the Eleventh Circuit dismissed the claim on summary judgment. The cases simply are irreconcilable.

This Court's decision in *Del Monte Dunes*, in reviewing and examining substantive due process claims, clearly defined the respective roles of the District Court and the jury. It also clearly defined the standards a government must satisfy to justify denial of property rights in such land use cases. Addressing the propriety of the instructions submitted to the jury at trial, this Court made clear the jury should determine whether: ". . . the city's decision to reject a

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5. If the local government can rely upon hypothetical afterthoughts to sustain their denial, to which the property owner had no opportunity to respond or correct, one might wonder if procedural due process is being denied as well. This is even more the case when a court (here, the Eleventh Circuit) can itself conjure up hypothetical reasons for denial that even the government could not create.

particular development plan bore a reasonable relationship to its **proffered** justifications." 526 U.S. at 721 (emphasis supplied).[6] Significantly, this Court has identified and limited the role of the trial court to examine only those "legitimate purposes" that were "proffered," "asserted," or "stated" by the governmental agency in support of its decision. This Court's determination of the proper test to be applied not only is controlling, but also the only practical, common sense approach to the issue which comports with a property owner's right to procedural due process in the determination of his constitutionally protected property rights. If government can give any reason whatever without any standard for judicial scrutiny, or if the court can entertain hypothetical after-the-fact justifications, the property owner lacks any procedural ability to address the local government's purported reasons for denying the proposed use of the property at the time the development order decision is made. Surely this is a basic requirement of constitutional due process in this country.

In comparison, the Eleventh Circuit, when reviewing government land use denials that impact constitutionally protected property interests, has continued to use a standard of analysis which makes local government decisions completely invulnerable to any challenge. It does so by supporting a governmental denial as long as any plausible, arguably legitimate purpose could be identified, even if the

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6. The bulk of the *Del Monte Dunes* decision is couched within the framework of the jury's decision supporting the due process claim. Nevertheless, the Court, and, particularly, Judge Scalia's concurring opinion, establishes that the same analogy applies across the board for all due process and equal protection claims under 42 U.S.C. § 1983, when the issue is whether the government's denial of a development order was rationally related to a legitimate government purpose. 526 U.S. at 624 (Scalia, J., concurring).

legislative body never even considered the "plausible" purpose and even if the purpose is only identified by the appellate court on appeal. *See Bannum, Inc. v. City of Fort Lauderdale, Fla.*, 157 F.3d 819 (11th Cir. (Fla.) 1998); *Haves v. City of Miami*, 52 F.3d 918 (11th Cir. (Fla.), 1995); and *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. (Fla.), 1995). *Del Monte Dunes*, however, has discredited this impermissibly deferential standard imposed by the Eleventh Circuit, a standard that effectively conferred upon the local planning bodies complete immunity and such a low threshold of review (essentially none) that any decision, no matter how arbitrary or capricious, would be deemed constitutional.

In addition to the Eleventh Circuit, various other circuits have adopted a standard which is hyper-deferential to local governments: the "hypothetically possible" standard of review. The "hypothetically possible" standard of review holds that if an appellate court could find *any* reason to support the local government decision, whether or not the reason was considered by the governing body, the local government's decision is not considered irrational or unconstitutional. *See Pro-Eco, Inc. v. Board of Com'rs*, 57 F.3d 505, 514 (7th Cir. (Kan.), 1995), *cert denied*, 116 S. Ct. 672 (1995); *See also Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119-20 (10th Cir. (Kan.), 1991). This Court now clearly has rejected this "hypothetically possible" standard of review in *Del Monte Dunes*, and to the extent the Circuits conflict with the *Del Monte Dunes* test, this Court now should expressly overturn the incompatible Circuits. The Eleventh Circuit's disregard of *Del Monte Dunes* in the case *sub judice* amply demonstrates the need for such a mandate.

Justice Scalia, at the *Del Monte Dunes* oral argument, clearly illustrated the guiding principal as to why local government decisions must be subject to some reasonable degree of scrutiny:

> Now let's talk about deference to the city's judgment. I can under — our normal rule is that we do defer and, if there's a rational basis, that's all we look to. But where you have a consistent process, as is alleged here, of turning down one plan, the next plan, the next plan, okay, I'll do this to satisfy you, isn't there some point at which, although there's a rational basis for the fifth decision, a rational basis for the fourth and the third and the second and the first, **you begin to smell a rat**, and at that point can't we say, despite our normal rational basis review, there's some other factor that begins to come in here, and that is, at some point you can say, this is simply unreasonable.

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 1998 WL 721087 (U.S. Oral Arg., Oct. 07, 1998), (97-1235) (emphasis added).[7] *Del Monte Dunes* explicitly outlines the standards a jury must employ to determine the reasonableness of a local government's land use decision: a jury must examine whether the government's decision bore a "reasonable relationship to its proffered justifications." 526 U.S. at 721. More importantly, a local government's

7. In *Del Monte Dunes*, Justice Scalia smelled a rat; in the case *sub judice*, one does not have to resort to "smell." Here the "rat" was an unlawful desire to compel a "public trust" on private land, without compensation, which "rat" was "heard" at the Board hearing and can be "seen" in the transcript of that hearing. *See* note 3, *supra*.

decision must be based on justifications which are offered; district courts and appellate courts will no longer be able to hypothecate the justifications necessary to support a land use decision.[8]

Aggrieved land owners need protection from autonomous local government bodies whose arbitrary and capricious decisions have become impervious to challenge because of the extreme judicial deference given to these decisions. Under the Eleventh Circuit's version of the rational basis test, no evaluation of the evidence is required, because hardly a scenario could ever be presented in which *some* rational basis not could be hypothesized by someone in an "after-the-fact" consideration. Under the *Del Monte Dunes* standard of review, a jury is given the opportunity to undertake meaningful evaluation of the evidence at hand to ensure that a local government's proffered justifications are reasonably related to its decision. The Eleventh Circuit's failure to apply even this deferential standard of review, which itself is very low, is inexplicable after *Del Monte Dunes*.

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8. Regrettably for Petitioners, the Eleventh Circuit in this case inexplicably ignored the impact of *Del Monte Dunes* on their decision *sub judice*. Although *Del Monte Dunes* was rendered after briefs were filed in the Eleventh Circuit, Petitioners filed a Notice of Supplemental Authority and presented the case at oral argument. The panel at oral argument indicated that it had not yet read *Del Monte Dunes*; however, Judge Wilson stated that his law clerk had reviewed the case and that she suggested he inquire of counsel for the County as to whether, in fact, *Del Monte Dunes* overruled Eleventh Circuit precedent regarding land use decisions. Counsel for the County responded that he had not yet read the decision. Inexplicably, the Eleventh Circuit did not mention *Del Monte Dunes* in its opinion, did not attempt to distinguish its contradictory decisions, and denied rehearing on this point.

The *Del Monte Dunes* standard also combats the concerns latent in local land use matters that Bernard H. Seigan aptly describes:

> In zoning matters . . . [c]onsiderations fundamental to the purpose of land-use regulation are swept away as the authorities succumb to their own desires and fears as well as [the desires] of those who exert the most pressure on them.

*Economic Liberties and the Constitution* 262 (1980) quoted in S. Weiner, "Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions." 69 Temp. L. Rev. 1467 (1996). The standard imposed in *Del Monte Dunes* at least requires local governments to act reasonably, clearly and fairly because such decisions will be subject to review by a judge and ultimately a jury, applying a reasonableness standard of review. As a result, property owners challenging local government land use actions, by knowing the reasons proffered by a local government for its actions, will stand a better chance at defending their constitutional property rights in the event that such rights have been inappropriately trampled, as in this case.

Quite simply, despite the fact that *Del Monte Dunes* is legally indistinguishable from the case at bar, the Eleventh Circuit's immutable "hypothetically possible" threshold effectively precluded Petitioners from presenting for jury consideration the blatant irregularities in the County Commission's proffered reasons,[9] not to mention its real

9. Petitioners effectively and completely refuted the ostensible reasons proffered by the County for its denial with the uncontroverted reports of the County's own staff, the County's own (Cont'd)

reason,[10] nor was a jury selected to hear Petitioner's claims.[11] Petitioners, in this case, were denied any opportunity by the District Court prior to *Del Monte Dunes*, and by the Eleventh Circuit after *Del Monte Dunes*, to determine whether Hillsborough County's decision was rationally related to its proffered justifications. This result is not legally correct and is not fair.

## II.

## THE ELEVENTH CIRCUIT'S FAILURE TO RECOGNIZE A DUE PROCESS TAKINGS CLAIM DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The ruling against Petitioners below was based upon the Eleventh Circuit's decision in *Villas of Lake Jackson v. Leon County*, 121 F.3d 610 (11th Cir. (Fla.), 1997), in which the Eleventh Circuit held that there is no substantive due process takings claim cognizable under 42 U.S.C. § 1983. This

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(Cont'd)
expert consultants, the Planning Commission staff, and twenty-six review agencies, all of whom stated that Petitioners had not only met all legal requirements but also the Board's additional conditions, and unanimously recommended approval.

10. I.e., the ulterior motive to force the Geracis to contribute their land to a "public trust" without compensation. *See* note 3, *supra*.

11. To grant summary judgment in this case not only violated the traditional standard regarding genuine disputes of material fact related to the reasonableness of the County's proffered justifications, but clearly violated the Petitioners' right to trial by jury under *Del Monte Dunes*, *supra*.

holding also directly conflicts with this Court's decision in *Del Monte Dunes*, *supra*.

In *Del Monte Dunes*, this Court affirmed the decision of the Ninth Circuit Court of Appeals and expressly rejected the City's contention that developers could not bring a takings claim under the due process clause of the United States Constitution. This Court stated:

> To the extent the City argues, that as a matter of law, its land use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principals. We reject this claim.

*Del Monte Dunes*, 526 U.S. at 1637. This Court then affirmed the jury's award as to the due process claim and made abundantly clear that due process takings claims under the Fourteenth Amendment to the United States Constitution are still viable under 42 U.S.C. § 1983. By contrast, in its 1997 decision in *Villas of Lake Jackson*, the Eleventh Circuit specifically held that:

> [O]ther than a due process claim based on arbitrary and capricious action, there is no "substantive due process takings" cause of action . . . separate and apart from a cause of action under the takings clause of the United States Constitution.

121 F.3d at 611. The Eleventh Circuit expressly applied this erroneous analysis in the instant case, notwithstanding *Del Monte Dunes*.

One need look no further than this Court's decision in *Del Monte Dunes* to determine that a substantive due process taking claim does in fact exist. In *Del Monte Dunes*, this Court expressly rejected the Eleventh Circuit's decision in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1986), which denied a developer a jury trial for a takings claim. Instead, this Court agreed with the Ninth Circuit that developers are entitled to have a jury determine the "reasonableness" of the relationship between the proffered "legitimate action," and the decision to deny the development application. *Del Monte Dunes* makes clear, contrary to the precedent established in the Eleventh Circuit, that property owners are entitled not only to bring due process takings claims under 42 U.S.C. § 1983, but also that they are entitled to a jury trial on that claim.

It is apparent from the Eleventh Circuit's disregard of *Del Monte Dunes* in this case that the Circuits need clear, consistent and direct guidance as to this issue of whether a due process takings claim exists. The Circuits are in flux. The Eleventh Circuit has inappropriately obliterated an aggrieved land owner's ability to bring a substantive due process claim under the Fourteenth Amendment separate and apart from a cause of action under the Fifth Amendment takings clause. *See Villas of Lake Jackson*, 121 F.3d at 611; also, the case *sub judice*. In *Del Monte Dunes* this Court clearly held that a cause of action exists for a due process taking in the area of land use under 42 U.S.C. § 1983 and the Fourteenth Amendment. The Eleventh Circuit's decision and its patent conflict with this Court's decision in *Del Monte Dunes* pose a great risk of seriously complicating the adjudication of due process takings claims in federal courts. Other Circuits and District Courts called to address this issue will be faced with two squarely inconsistent decisions, the

Eleventh Circuit's bold abjuration of any substantive due process takings claim and this Court's recognition of such a claim.

As to the substance of the issue, this Court has consistently rejected the view that the applicability of one constitutional amendment necessarily preempts the guarantees of another. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). Moreover, this Court has opined that a particular action may implicate more than one constitutional protection. *See Sodal v. Cook County, Ill.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than one single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn.") Based on this Court's analysis, the fact the takings clause of the United States Constitution may apply to particular situation does not mean that all substantive due process guarantees are no longer in effect. *See John Corporation v. City of Houston*, 214 F.3d 573 (5th Cir. (Tex.), 2000). Therefore, the reasoning posited by the Eleventh Circuit, by wholly rejecting due process takings claims under the Fourteenth Amendment and 42 U.S.C. § 1983 before evaluating the possibility of such a claim, conflicts with *Del Monte Dunes*.

Confusion spawned by holdings of the Eleventh Circuit has already penetrated the Fifth Circuit. Recently, a Texas District Court tried to apply a blanket rule that the takings clause eliminates a substantive due process claim relating to the deprivation of private property. *See John Corporation v. City of Houston*, 214 F.3d 573 (5th Cir. 2000). The Fifth

Circuit, however, soundly rejected such an overreaching pronouncement, and clearly stated that: "[A] careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause" and in the proper case, by alternative constitutional protections. *John Corporation*, 214 F.3d at 583. The Fifth Circuit also stated that the takings clause does not subsume all substantive due process claims related to the deprivation of property. *Id.* at 582. Therefore, consistent with the law of this Court, a due process takings claim under the Fourteenth Amendment and 42 U.S.C. § 1983 may exist independently of a claim under the takings clause and a court must assess each claim independently to review its viability, a stark contrast to the holdings of the Eleventh Circuit, including the case *sub judice*.

It is clear that this Court's recognition that an aggrieved property owner can bring a substantive due process takings claim under 42 U.S.C. § 1983 contradicts the case law in the Eleventh Circuit. This Court's decision in *Del Monte Dunes* emphasizes that District Courts and Courts of Appeal cannot readily dismiss a substantive due process claim related to the deprivation of property under the Fourteenth Amendment based on a plenary rule of law that the takings clause eliminates such claims. Such a rule is inaccurate and inappropriate in light of *Del Monte Dunes*. Instead, this Court, by recognizing the existence of a due process takings claim, requires a more meaningful review of the merits of the claim raised by aggrieved property owners. Each constitutional protection must be examined in turn. Furthermore, a jury must decide the reasonableness of the local government action. The holding of the Eleventh Circuit in the case *sub judice* is untenable with this Court's decision

in *Del Monte Dunes*. This Court should: (i) firmly and clearly reiterate its holding in *Del Monte Dunes*, that an aggrieved property may bring a due process takings claim under 42 U.S.C. § 1983 that is subject to jury review; (ii) expressly overrule the Eleventh Circuit precedent to the contrary; and (iii) mandate the Eleventh Circuit to apply it to this case.[12]

## III.

## THIS QUESTION IS IMPORTANT

In *Del Monte Dunes* this Court reaffirmed and continued its reasonable protection of property owners deprived of use of their property[13] when this Court recognized the existence of a due process takings claim to challenge local land use decisions. However, this Court's recognition of such a claim will prevent injustice only if those Circuits (including the Eleventh) who have long held otherwise are compelled to

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12. Petitioners recognize that, given the clear holding of *Del Monte Dunes*, this should not be necessary. However, Petitioners simply could not get the Eleventh Circuit to consider the obvious implications of *Del Monte Dunes* upon their case. Petitioners have a substantial claim (approximately $200 Million) and have been denied their day in court, before a jury of their peers, against an oppressive local government who had an ulterior, if not hidden, agenda. Also *see* note 3, *supra*. To allow the Eleventh Circuit's decision, below, to stand will validate the completely unfettered ability of government to trample property owners who not only smell a rat, but even those who hear the rat, see the rat, and expose the rat.

13. *See, e.g.*, *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. Tigard*, 512 U.S. 374 (1994); *Situm v. Tahoe Regional Planning Council*, 520 U.S. 725 (1997).

follow the law of the land. In its decision in *Del Monte Dunes,* this Court recognized the existence of several types of alternative federal claims for property deprivation, including a just compensation takings claim under the Fifth Amendment, a due process takings claim and a regulatory takings claim. At times, however, federal and state courts have interchanged these claims, recognizing some claims and rejecting other claims, leading to inconsistent and confusing results. This Court, therefore, needs to clearly articulate to property owners, local governments, planning agencies and the various state and federal courts the subtleties inherent in these types of property claims. Given the rapidly changing state of land use law governing development in this nation, many more issues regarding the rights of property owners will arise over the next several years. Without proper guidance, the extent of confusion and inconsistency in state and federal court decisions will multiply. The Eleventh Circuit's decision in the case *sub judice* amply demonstrates that the direction has not yet been made sufficiently clear. This Court should once again take the initiative to harmonize the many different and difficult rules of law speckled across the nation so that two land owners with similar rights facing similar government actions will come out with similar and fair results.

## CONCLUSION

This petition for writ of certiorari should be granted to resolve a blatant conflict among the Circuits, to compel the Eleventh Circuit to apply *Del Monte Dunes* to overrule its contrary precedent, to provide clear guidance to both federal and state courts as to the existence of a substantive due process takings claim and the appropriate standard of review for such land use claims, and to prevent a grave injustice in this case.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 19, 2000**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3640

D. C. Docket No. 95-00050-CIV-T-25B

ADVANCE LEASING AND DEVELOPMENT, INC., PETER A. GERACI, ROY N. GERACI,

Plaintiffs-Appellants,

versus

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, JOSEPH CHILLURA, in his official capacity as a Commissioner of Hillsborough County, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 19, 2000)

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

*Appendix A*

PER CURIAM:

This appeal arises from a land-use controversy. Plaintiffs are would-be developers. The district court granted Defendants summary judgment. Briefly stated, the case presents these issues:

1. Was it error to grant summary judgment for Defendants on Plaintiff's substantive due process claim?

2. Was it error to grant summary judgment for Defendants on Plaintiff's equal protection claim?

3. Was it error to grant summary judgment for Defendants on Plaintiff's due process takings claim?

4. Was it error to grant summary judgment for Defendants on Plaintiff's impairment of contract claim?

5. Was it error to grant summary judgment for Defendants on Plaintiff's procedural due process claim?

The district court wrote an extensive opinion and order.

No reversible error has been demonstrated. The judgment of the district court is AFFIRMED.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED SEPTEMBER 21, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 95-50-CIV-T-25B

**ADVANCE LEASING AND DEVELOPMENT, INC.**, a Florida corporation, **PETER A. GERACI**, and **ROY N. GERACI**,

Plaintiffs,

v.

**CHRIS HART**, in his official capacity as a Commissioner of Hillsborough County, et al.,

Defendants.

### ORDER

**THIS CAUSE** is before the Court on Defendant Murley's Motion for Summary Judgment (Dkt.177), Plaintiff's Motion for Summary Judgment on Count VII (Dkt.189), Defendant Murley's Motions for Judicial Notice (Dkts.212,288), Defendants' Motion for Summary Judgment on Counts I-VII (Dkt.236), Defendants' Motion to Dismiss Count VII (Dkt.240), Defendants' Motion to Dismiss Count III (Dkt.250), and Defendants' Motion to Dismiss Counts I

and II (Dkt.261). Upon consideration of said motions and responses, the file herein, and otherwise being fully advised, the Court finds as follows.

## I. FACTS

The facts herein are well known to the parties and have been cited repeatedly in various motions and memoranda filed in this case (*See* Dkts.1,177,189,240,250,261). In summary, this case pertains to a failed land use redesignation application. Advance Leasing, successor to Forbes Cohen Development Corporation, desired to construct a large commercial mall on the corner of Dale Mabry Highway and Van Dyke Road in Hillsborough County. Plaintiffs sought to change the land use designation, and to that end expended large sums in testing and analysis of the property as required by various local agencies and departments. After several months in this process, Plaintiffs negotiated with the County, Department of Community Relations and the Sierra Club, to redesignate Plaintiffs' property in the Comprehensive Land Use Plan of Hillsborough County as "Urban Mixed Use," consistent with Plaintiffs' planned use of the property.

The Governor and the Administration Commission entered a Final Order recommending implementation of Plaintiffs' proposed designation. The Board of County Commissioners, however, ultimately decided to down plan Plaintiffs' property from an "Urban Mixed Use" to a "Community Mixed Use" designation. Plaintiffs now contend that they will be precluded from constructing the intended mall, and it would be impossible to find a similar site for the proposed mall. Plaintiffs have sued the Board of

County Commissioners and the State of Florida for various state and federal causes of action based on the denial of their rezoning application.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is not appropriate unless the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317 (1986); Fed. R. Civ. P. 56. The moving party satisfies its burden by showing an absence of evidence to support an essential element of the nonmoving party's case. *Celotex*, 477 U.S. 317. Once the moving party demonstrates the absence of a genuine material fact, whether or not accompanied by affidavits or other proof, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)); *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1382 (11th Cir. 1990). A plaintiff cannot prevent judgment by merely resting on the conclusory allegations of her pleadings, or on the basis of conjecture, suspicion, or surmise. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Hence a plaintiff must come forth with significantly probative evidence to support her claims. *Id.*

*Appendix B*

## III. FEDERAL CLAIMS

### A. COUNT I — SUBSTANTIVE DUE PROCESS

#### 1. Motion to Dismiss (Counts I and II)

The County moves to dismiss Counts I and II on the grounds that the Court must abstain due to pending state administrative proceedings. Based on the record herein, it appears that Plaintiffs have dismissed their petition in the administrative proceedings. As to the County's argument under the finality doctrine that Plaintiffs' claims are not ripe, this Court previously found that Plaintiffs' due process takings claim was ripe for review. (*See* Dkt.55 at 3-4). Similarly, the Court finds Counts I and II ripe for consideration.

#### 2. Summary Judgment

Plaintiffs bring Count I pursuant to 42 U.S.C. § 1983 contending that the County's actions have violated their substantive due process rights. The County moves for summary judgment as to Count I on the grounds that: (1) Plaintiffs have no constitutionally protected property right to rezoning; (2) Plaintiffs complain of quasi-judicial acts which do not support a substantive due process claim; and (3) the County's action was rationally related to a legitimate government purpose.

In order to establish a substantive due process claim, Plaintiffs must show that they had a constitutionally protectible property interest, and that the County deprived

Plaintiffs of that interest by means that were " 'pretextual, arbitrary and capricious, and without any rational basis.' "[1] *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994) (quoting *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982)).[2]

Defendants cite *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), for the proposition that the County's actions were quasi-judicial, and thus not the proper subject of a substantive due process claim. In *McKinney* the Eleventh Circuit considered the substantive due process claim of a County employee who claimed he was terminated unfairly. In its opinion, the Court stated that substantive due process protection applies only to rights created by the Constitution, and not those that arise under state law, such as tort and

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1. The Court declines to apply the authority urged by Plaintiffs. In *Board of County Commrs. v. Snyder*, 627 So.2d 469 (Fla. 1993), the Florida Supreme Court alluded to "constitutional rights," but did not purport to assess a federal substantive due process claim pursuant to 42 U.S.C. § 1983. Likewise, the United States Supreme Court decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) approved of various analysis used by state courts in evaluating Fifth Amendment Takings Claims, not substantive due process claims.

2. The Court notes that *Hearn* was overruled in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), and in fact, the County relies on *McKinney* for the proposition that Plaintiffs may not bring a substantive due process claim. For the reasons stated *infra*, however, the Court concludes that *McKinney* does not bar Plaintiffs' substantive due process claim. *See, e.g. New Port Largo Inc. v. Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996); *and Villas of Lake Jackson, Ltd. v. Lee County*, 121 F.3d 610, 614 (11th Cir. 1997).

employment law. *Id.* at 1557. The Court expanded on its distinction between substantive and procedural due process rights, noting *inter alia* that substantive due process rights are protected " 'against certain government actions regardless of the fairness of the procedures used to implement them' " *Id.* at 1556 (quoting *Collins v. City of Harker Hts.*, 503 U.S. 115 (1992)). In a footnote, the Court distinguished between "legislative" acts, which generally apply to a large segment of society, and "executive" acts, which arise from the administrative activities of members of the executive branch, suggesting that substantive due process protection only applies to legislative acts. *See McKinney*, 20 F.3d at 1557 n.9.

The language of *McKinney* therefore arguably provides support for Defendant's position that Plaintiffs' complaint arises from an executive rather than legislative act and is therefore barred. Nevertheless, the Eleventh Circuit has applied the substantive due process analysis in land use cases subsequent to *McKinney*. *See New Port Largo, Inc.*, 95 F.3d at 1091; *see also Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213-14 (11th Cir. 1995); *cf. also Villas of Lake Jackson*, 121 F.3d at 614 ("[a]ssuming . . . that the district court was correct in classifying the down-zoning as a legislative rather than executive act . . ."). Based on the above cases, the Court concludes that *McKinney v. Pate* does not preclude Plaintiffs' substantive due process claim.

Defendants next contend that Plaintiffs lack a vested, property interest in rezoning to build a commercial mall. The Eleventh Circuit has found various circumstances in which a plaintiff may have a protectible property interest. *See id.*

(protectible interest in building permit); *see also Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989) (protectible interest in building permit where municipality lacks discretion to deny permit to applicant who satisfies statutory requirements); *and see Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1490 (N.D. Fla. 1992) (protectible interest in building permit where circumstances give rise to the doctrine of equitable estoppel) (cited by *Reserve, Ltd. v. Town of Longboat Key*). In this case the Court agrees that Plaintiffs have not shown a vested interest in the redesignation of their property in the Comprehensive Plan. Plaintiffs did not rely on existing zoning, but claim that they acquired a vested interest in redesignation which would lead to the rezoning of their property in the future. Viewing the facts in the light most favorable to Plaintiffs, the Court does not find that Plaintiffs had a vested right to the redesignation of their property, under an estoppel or any other theory.

Further, even assuming Plaintiffs acquired a vested interest, Plaintiffs have not raised an issue of material fact as to whether the County's actions were arbitrary and capricious. Plaintiffs assert that their proposed project ultimately complied with all aspects of the Comprehensive Plan and Land Development Code, and the County's rejection of the plan after repeated requests to redesign their plan and submit new data was arbitrary and capricious. Nevertheless, Plaintiffs have not provided any evidence to show that the County's actions were not rationally related to a legitimate purpose, that of "promoting compatibility with surrounding rural and residential uses, of protecting the environment, and/or avoiding traffic congestions and hazards." (Dkt.236 at 4). Plaintiffs have not shown evidence,

beyond mere suspicion, that they were targeted for selective treatment. *Compare Reserve, Ltd.*, 17 F.3d at 1374. Accordingly, the County's motion is granted as to Count I.

## B. COUNT II — EQUAL PROTECTION

To prevail on their as-applied claim of equal protection, Plaintiffs must show that they were treated differently from similarly situated persons and that the County unequally applied the zoning laws for the purpose of discriminating against Plaintiffs. *See GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) (citing *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996). The County contends that other projects were inherently different from that proposed by Plaintiffs, therefore, Plaintiffs have shown no similarly situated applicants who were treated differently.[3]

In their response to the County's motion, Plaintiffs argue that the similarity analysis focuses on the claimant and not the property. It appears that the cases discussing equal protection have evaluated both the claimants and the property, depending on the circumstances.[4] Nevertheless,

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3. For example, Defendants assert that the Citrus Park Mall, close in proximity to Plaintiffs' proposed mall site, involved aggregated parcels, whereas Plaintiffs' proposed development carved up a parcel and created planning problems. (Dkt.236 at 6, Gersholwitz Depo. (Dkt.192) at 187-189).

4. *See, e.g., G.J.R. Investments, Inc.*, 132 F.3d at 1367-68 (finding that the plaintiff failed to allege that a similarly situated

(Cont'd)

*Appendix B*

Plaintiffs proffer no specific claimants or projects which they allege are similarly situated. Rather, Plaintiffs conclude that the record in this case contains evidence of disparate treatment. (*See* Dkt.252 at 10). Among the items referenced is the deposition of Advance Leasing corporate representative William Ockunzzi, who states that in his opinion "the record"[5] of other projects shows that the County required excessive documentation, study and investigation of Plaintiffs' proposed project. (*See* Dkt.217 at 55-57).[6] Ockunzzi opines that those projects, which he asserts were less likely to have been approved, were handled with considerably less effort on the part of the applicant. (*See id*).

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(Cont'd)
developer was denied a permit); *Villas of Lake Jackson, Ltd.*, 121 F.3d at 614 (affirming trial court's grant of summary judgment on equal protection claim based on "undisputed evidence of the unique aspects of the tract as contrasted to other assertedly similarly situated properties"); *Reserve, Ltd.*, 17 F.3d at 1381 (noting that the plaintiff had created an issue of fact as to whether plaintiff had been treated differently than other similarly situated developers); *and cf. Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991) (noting that plaintiffs properly alleged that defendants treated them differently from other similarly situated "landowners along Interstate 95").

5. Ockunzzi appears to refer generally to the public record of the rezoning files of Hillsborough County regarding this and other proposed projects. (*See* Depo. at 6).

6. Ockunzzi states that the other projects were the Tri-County Business Park with which he was personally involved, and the Citrus Park Mall and Brandon Towne Center, of which he had no personal knowledge or involvement.

The Court finds that Plaintiffs have not provided a single instance in which a similarly situated claimant was treated differently. Plaintiffs do not refer to any similar claimants, and fail to explain how the projects referenced in the record were similarly situated to that of Plaintiffs. Merely listing other projects and asserting that it is likely they were treated differently does not create a genuine issue of material fact as to whether they were similarly situated. Summary judgment is therefore appropriate on Plaintiffs' equal protection claim.

## C. COUNT IV — DUE PROCESS TAKINGS

Plaintiffs concede that their due process taking claim is no longer viable in light of *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997). Accordingly, Defendants' motion for summary judgment is granted as to Count IV.

## D. COUNTS V — CONTRACTS CLAUSE

Plaintiffs seek damages and injunctive relief pursuant to 42 U.S.C. § 1983 for the County's alleged impairment of contracts between the Geracis and Forbes Cohen, the Geracis and Advance Leasing, and Plaintiffs and Hillsborough County. (Complaint at 56-58). Additionally, Plaintiffs have moved for summary judgment on Count VII, their breach of contract claim. Defendants move for summary judgment on the grounds that, *inter alia*, there was no contract between Plaintiffs and Hillsborough County, that any such contract would be void as contract zoning, and that the Administration Commission has determined that the County has complied with the Final Order.

*Appendix B*

The Contracts Clause provides that "[n]o State shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts." U.S. Const. Art. I § 10, cl. 1. Before a claim may be pursued under the Contracts Clause, the existence of a contract must first be established. *See Rhode Island Laborers' Dist. v. State of Rhode Island*, 145 F.3d 42, 43 (1st Cir. 1998); *see also Conway v. Sorrell*, 894 F. Supp. 794, 799 (D. Ver. 1995) (citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). In support of their claim that a contract exists between Plaintiffs and the County, Plaintiffs refer to the Final Order which Plaintiffs allege contains the terms of a "valid binding Settlement Agreement" between Plaintiffs, Hillsborough County, the Department of Community Affairs, and the Sierra Club. (Dkt.252). The Final Order does refer to a Settlement Agreement, but the Order does not in itself purport to be an agreement, nor can the Court infer an agreement from the language and circumstances. *See Rhode Island Laborers'*, 145 F.3d at 799; (*See* Dkt.1, Exh.H). Without a valid contract, Plaintiffs cannot prevail on their Contracts Clause claim under Article I. Plaintiffs' motion for summary judgment is denied and the County's motion is granted.

## E. COUNT VI — PROCEDURAL DUE PROCESS — TURANCHIK RECUSAL

Plaintiffs allege in their Complaint that Commissioner Ed Turanchik was a former Sierra Club attorney and therefore possessed a conflict of interest which tainted the County's decision and denied Plaintiffs due process. To avoid the consequences of *McKinney v. Pate*, Plaintiffs' claim that the general procedural remedies provided by the State of Florida

are inadequate to remedy the defect. Nevertheless, in terms of procedural due process, *McKinney* is clear that Plaintiffs should have availed themselves of the state remedy, or shown that the State *refused* to provide a remedy. *See id.* Although Plaintiffs challenged the denial of their application in an administrative proceeding, Plaintiffs have withdrawn their appeal. (*See* Dkt.250, Exh.E). Because Plaintiffs have not shown that the State of Florida refused to provide a remedy, Plaintiffs' procedural due process claim must fail.

## F. COUNT VIII — INJUNCTION

In Count VIII Plaintiffs seek an injunction pursuant to 42 U.S.C. § 1983 to prevent the State of Florida from ratifying the County's decision to downplan the property herein, to order the State to find the downplanning illegal, and to order Hillsborough County to adopt the amendments to the Comprehensive Plan urged by Plaintiffs. Defendant Murley, in his capacity as Secretary of the Department of Community Affairs for the State of Florida, moves for summary judgment on several grounds. Count VIII appears to present claims under substantive and procedural due process, takings, and the Contracts Clause. Because the Court's disposition of the above claims asserted against the County is equally applicable to Defendant Murley, summary judgment should be granted as to Count VIII. Accordingly, Defendant Murley's motion for summary judgment is granted.

## IV. PENDENT STATE LAW CLAIMS

In Counts III and VII Plaintiffs raise claims of equitable estoppel and breach of contract. As no federal claims remain

in this case, the Court declines to exercise jurisdiction over these purely state law claims. Counts III and VII are dismissed.

## V. CONCLUSION

Consistent with the foregoing, it is **ORDERED**:

1. Defendants' Motion for Summary Judgment on Counts I-VII (Dkt.236) is **GRANTED** as to Counts I, II, IV, V, and VI, and the Clerk is directed to enter judgment for said Defendants on said Counts;

2. Defendant Murley's Motions to Take Judicial Notice (Dkts.212,288) are **GRANTED**;

3. Defendant Murley's Motion for Summary Judgment on Count VIII is **GRANTED**, and the Clerk is directed to enter judgment for said Defendant;

4. Plaintiffs' Motion for Summary Judgment on Count VII (Dkt.189) is **DENIED**;

5. Defendants' Motions to Dismiss (Dkts.240,250,261) are **DENIED**;

6. Counts III and VII are hereby **DISMISSED**;

7. The Clerk is directed to terminate all other pending motions.

*Appendix B*

**DONE AND ORDERED** at Tampa, Florida this 21 day of September, 1998.

s/ Henry Lee Adams, Jr.
**HENRY LEE ADAMS, JR.**
UNITED STATES DISTRICT COURT

**APPENDIX C — PER CURIAM ORDER OF THE *UNITED STATES COURT OF APPEALS FOR THE* ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 24, 2000**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 98-3640-AA

ADVANCE LEASING AND DEVELOPMENT, INC., PETER A. GERACI, ROY N. GERACI,

Plaintiffs-Appellants,

versus

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, JOSEPH CHILLURA, in his official capacity as a Commissioner of Hillsborough County, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, DUBINA and WILSON, Circuit Judges.

Supreme Court, U.S.
FILED
SEP 28 2000
CLERK

(2)

No. 00-348

IN THE

# Supreme Court of the United States

ADVANCE LEASING AND DEVELOPMENT, INC., *et al.*,

*Petitioners,*

*v.*

CHRIS HART, *etc., et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT SEIBERT

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## QUESTIONS PRESENTED

I. Whether This Court Has Jurisdiction Of This Case.

II. Whether The Judgment Of The Court Of Appeals Is Inconsistent With Any Decision Of This Court.

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## STATEMENT OF THE CASE

The events material to this proceeding date from December 16, 1993 when the Governor and Cabinet, sitting as the Administration Commission, approved the designation of petitioners' land as Urban Mixed Use. The issue here is the effect of the later redesignation of petitioners' land as Community Mixed Use which the Department of Community Affairs approved.[1] Although either designation would have allowed a shopping mall, under the Community Mixed Use designation the development would not be allowed if it exceeded 650,000 square feet. The petitioners alleged below that the redesignation worked a taking compensable under the Just Compensation Clause of the Fifth Amendment and an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. The United States District Court ruled that it did not, and the United States Court of Appeals affirmed.

While this case was pending in the District Court, petitioners initiated a quasi-judicial administrative proceeding with the Department to contest the redesignation of the petitioners' land to Community Mixed Use. The resolution of that question turned upon the effect of the earlier Final Order of the Administration Commission calling for the Urban Mixed Use designation. In the administrative proceeding the petitioners contended *inter alia* that the Final Order controlled the designation of the mall site notwithstanding the lapse of time and the consequent need

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1. In this Brief, the Florida Department of Community Affairs is called "the Department" and the Secretary of the Department, who is sued in his official capacity, is referred to as "the Secretary." As in the Petition, the Final Order rendered by the Administration Commission on December 16, 1993 is called the "Final Order."

to reconsider existing land planning designations in light of new demographic information. In its own Final Order upholding the redesignation of petitioners' land as Community Mixed Use, the Department addressed the effect of the earlier Final Order. Appendix at 20-24. The Department rejected petitioners' argument with the observation that "the Administration Commission determined that the subject plan amendments [from Urban Mixed Use to Community Mixed Use] are consistent with its December 16, 1993 Final Order. The Administration Commission is in the best position to interpret its own order." Appendix at 23-24. Based on this and other determinations, the Department entered a Final Order on January 12, 1999 upholding the redesignation of the petitioners' land to Community Mixed Use.

Petitioners appealed the Final Order of the Department to the District Court of Appeal of Florida, and the District Court of Appeal affirmed the Final Order without opinion. *Geraci v. Department of Community Affairs*, 754 So. 2d 35 (Fla. Dist. Ct. App. 1999) (*per curiam*). No petition to review this judgment was taken to the Supreme Court of Florida.

## REASONS FOR DENYING THE WRIT

The issues petitioners raised before the Department in the administrative proceeding were addressed in the Final Order of the Department. When the District Court of Appeal of Florida affirmed the Final Order, the resolution of those issues by the Department merged into the judgment of affirmance, and the petitioners did not take any proceeding to review that judgment in the Supreme Court of Florida. That judgment is now final, and is binding on the parties and those in privity with them. In any event, the effect of the

earlier Final Order from the Administration Commission was an issue of state law, not federal law. Last, nothing in the judgment of the United States Court of Appeals conflicts with the recent decision of this Court relied on by petitioners.

## I. THIS COURT HAS NO JURISDICTION OF THIS CASE.

Petitioners concede that their case as applied to the Secretary rests solely on the enforceability of the Final Order by the Administration Commission. Petition at 8 n.4. Petitioners' argument is fatal to the jurisdiction of this Court as applied to the Secretary for at least three reasons. First, the legal effect of the Final Order was determined when the District Court of Appeal of Florida affirmed the Final Order of the Department, and the petitioners failed to petition the Supreme Court of Florida to review that judgment. Second, even if petitioners had undertaken further proceedings to contest the judgment of the District Court of Appeal, the effect of the Final Order is an issue of state law which this Court has no jurisdiction to consider. Third and last, petitioners raised the federal issues applicable to the Secretary in federal and state proceedings at the same time, and in both cases were seeking the same remedies: a binding adjudication that the Final Order was enforceable and forever fixed. Yet the petitioners failed to follow the procedures specified by this Court for preserving federal claims for presentation to a federal forum. Insofar as the present case applies to this respondent, the United States District Court should have abstained from passing upon these issues altogether.

### A. The Effect Of The Final Order Was Determined By The District Court Of Appeal of Florida.

Petitioners' statement that they sued the Secretary "solely" to ensure the enforceability of the Final Order of the Administration Commission betrays a remarkable indifference to the rules of preclusion that limit judicial power. Since the enforcement of the Final Order is petitioners' sole rationale for keeping the Secretary a party to this case, this Court should reject it. The judgment of the District Court of Appeal of Florida was allowed to become final, so this Court is barred both by Act of Congress and its own precedent from revisiting the judgment.

Under the Full Faith and Credit Act, judgments such as the one rendered by the District Court of Appeal have "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they were taken." 28 U.S.C. § 1738. This Court has applied the Act to preclude the relitigation of matters determined earlier in state judicial proceedings between the same parties. *See Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-80 (1985); *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). Like the present case, *Allen* arose under the Civil Rights Act of 1871. *See* 42 U.S.C. § 1983. Likewise in *Allen*, this Court ruled that after a state judicial proceeding had become final, the respondent in that proceeding was not allowed to use the Civil Rights Act as a contrivance to relitigate the same issues. 449 U.S. at 95-96. Petitioners are foreclosed from doing so here also, for a *per curiam* affirmance by the District Court of Appeal of Florida has *res judicata* effect. *Florida Farm Bureau Mutual Insurance*

*Co. v. Florida Fruit and Vegetable Association*, 436 So. 2d 1052 (Fla. Dist. Ct. App. 1983); *McDaniel v. Musgrove*, 427 So. 2d 1091 (Fla. Dist. Ct. App. 1983). As it did in *Allen*, the Court in this case should reject petitioners' misuse of the Civil Rights Act to circumvent the doctrine of *res judicata* and other rules of preclusion based on state law.

### B. The Effect Of The Final Order Is An Issue Of State Law Of Which This Court Has No Jurisdiction.

In such cases as *Allen* and *Marrese* the issues the parties were barred from revisiting arose under federal law, even though the federal issues had been disposed of in antecedent state judicial proceedings. Petitioners here cannot even say that much. Here the effect of the Final Order by the Administration Commission is an issue of state law. Needless to say, this Court has no jurisdiction to determine issues of state law. *See Republican National Committee v. Burton*, 455 U.S. 1301, 1302 (1982) (Rehnquist, J.); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935). Once more, the enforceability of the Final Order is petitioners' sole rationale for holding the Secretary hostage to this proceeding. Petition at 8 n.4. Even if it did not violate the Full Faith and Credit Act to revisit that issue, this Court still would have no jurisdiction to consider it.

### C. The District Court Should Have Abstained From Consideration Of This Case With Respect To This Respondent.

Federal judicial power is not allowed to interfere with pending state judicial or quasi-judicial proceedings if abstaining from the exercise of federal jurisdiction would obviate "the necessity of a decision on a constitutional question." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29 (1943); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941). Given the outcome of the state proceedings here, this case underscores the importance of the abstention doctrine. Insofar as this case applied to the Secretary, the District Court should have abstained here to prevent "needless friction with state policies" administered by the Department. *Railroad Commission v. Pullman Co.*, *supra*, 312 U.S. at 500. Abstention would have been proper in this case because "interference with a state judicial proceeding prevents the State not only from effectuating its substantive policies, but also from . . . providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). The doctrine encompasses any judicial or quasi-judicial state proceedings in which federal constitutional questions may be reviewed.[2] *See Ohio Civil Rights*

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2. In the proceeding before the Department the petitioners raised constitutional issues as well. Appendix at 20. Although the Department has no authority to determine constitutional issues, the District Court of Appeal and Supreme Court of Florida have jurisdiction to consider them at any later stage of the proceeding. *Key Haven Associated Enterprises, Inc. v. Board of Trustees*, 427 So. 2d 153, 156-58 (Fla. 1982); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1379-80 (Fla.), *cert. denied sub nom. Taylor v.*

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*Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 437 (1982); *Younger v. Harris*, 401 U.S. 37, 44 (1971). As this Court expressed it in *Younger*, government "will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. Land use planning is no exception. The doctrine applies to state agencies acting in a quasi-judicial capacity as the Department was here. Indeed, the seminal *Burford* and *Pullman Co.* cases themselves arose from quasi-judicial administrative proceedings.

This is not a case in which the quasi-legislative functions of the Department are called into question. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989). Nor did the petitioners invoke the procedures approved by this Court to limit state judicial proceedings to state law issues by splitting off the federal constitutional questions for separate determination in the District Court. *See Hicks v. Miranda*, 422 U.S. 332, 336 (1975); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421-22 (1964). Petitioners' multiplication of the proceedings was improper, and this Court should not condone it.

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*Graham*, 454 U.S. 1083 (1981); *Long v. Department of Administration*, 428 So. 2d 688, 692-93 (Fla. Dist. Ct. App. 1983); *Rice v. Department of Health & Rehabilitative Services*, 386 So. 2d 844, 848 (Fla. Dist. Ct. App. 1980). The state proceedings here were more than adequate to redress any alleged constitutional violations.

## II. THE JUDGMENT OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT.

Even if the Court had jurisdiction, the petitioners' arguments that the Court should give this case plenary consideration are untenable. Petitioners' argument rests on supposed inconsistencies between the judgment of the Court of Appeals and a recent decision by this Court. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Yet nothing in *Del Monte Dunes* altered the elements of a compensable taking.

In *Del Monte Dunes* this Court affirmed a judgment for takings damages entered on a jury verdict. 526 U.S. at 723. There the Court narrowed the effect of its holding by its refusal to draw "a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests." *Id.* at 722. Furthermore, this Court based its holding upon the application of the Seventh Amendment to damage actions for inverse condemnation under the Civil Rights Act of 1871. *Id.* at 721-22. Petitioners now cite *Del Monte Dunes* as authority for the notion that the District Court should have allowed the present case to get to the jury. The pivotal difference is that the developer in *Del Monte Dunes* had sufficient evidence to give the jury.[3]

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3. This is not the only difference. Nineteen different site plans were submitted in *Del Monte Dunes*, and five denials occurred. 526 U.S. at 698. A conditional permit was granted in *Del Monte Dunes*, but was not extended. *Id.* at 696-97. Continued development in *Del Monte Dunes* was hampered at the time of final denial by a sewer moratorium. *Id.* at 697. In the present case petitioners (Cont'd)

The cases have no factual similarities. The proposed development in *Del Monte Dunes* was below the allotted intensity of use for the planning designation of the land. 526 U.S. at 694-96. Petitioners' primary contention here is that a taking inhered in the redesignation of the land from Urban Mixed Use to Community Mixed Use, which allowed up to 650,000 square feet of commercial development. Petition at 5-6; *id.*, Appendix B at 4a. It is this redesignation that petitioners are seeking to portray as a taking in the present case.

The jury in *Del Monte Dunes* was instructed to find for the developer if the developer was denied all economically viable use of land, or if the rejection of the development application by the local government bore no logical relationship to its proffered justification or was unsupported by a legitimate public purpose. 526 U.S. at 719-21. The owner is not denied all beneficial use of his land until the local government prohibits him from doing anything with it. *Id.* at 700. In any event, a takings case under the Civil Rights Act may only be sent to the jury if the owner offers

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(Cont'd)
submitted only two applications. Petition at 4-7. Here even after the final denial of petitioners' application the land use designation allowed for development up to 650,000 square feet. Petition at 6; *id.* at 8. Another difference lies in the unconditional character of the denial of the development application in *Del Monte Dunes*. The developer there was not allowed to pursue the development of its property after the final denial of its development application because the local government did not state the conditions on which it would be reconsidered. 526 U.S. at 697-98. The only conditions confronting petitioners in the present case stemmed from the ceiling on square footage due to the Community Mixed Use designation. A mere planning designation is not a taking, and nothing in *Del Monte Dunes* suggests otherwise.

evidence to show that damage remedies were unavailable elsewhere. *Id.* at 721. Petitioners had no such evidence to present in this case. Likewise, petitioners had no evidence tending to show that the denial of its application was arbitrary or unrelated to a legitimate public purpose. Petition, Appendix B at 9a. The County based its action *inter alia* on the need to protect the compatibility of adjacent uses. Compatibility is well within the universe of variables a local government may consider when it acts upon a development application. Petition, Appendix B at 4a; *id.* at 9a-10a. Here the petitioners had no evidence tending to discredit this rationale as either arbitrary or unrelated to a legitimate public purpose.

## CONCLUSION

With respect to this Respondent, the Petition for Writ of Certiorari should be dismissed for lack of jurisdiction. In the alternative, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX

# APPENDIX — FINAL ORDER FINDING PLAN AMENDMENT IN COMPLIANCE WITH CHAPTER 163, PART II, FLORIDA STATUTES DATED JANUARY 12, 1999

[Omitted here but submitted separately in Lodging Appendix]

Supreme Court, U.S.
FILED
OCT 05 2000
CLERK

(3)

No. 00-348

IN THE

# Supreme Court of the United States

ADVANCE LEASING AND DEVELOPMENT, INC., *et al.*,

*Petitioners,*

*v.*

CHRIS HART, *etc., et al.*,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF IN OPPOSITION FOR RESPONDENTS HILLSBOROUGH COUNTY, CHRIS HART AND JOSEPH CHILLURA

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## QUESTIONS PRESENTED BY PETITION

Whether *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) eliminated the rational basis test so as to mandate the reversal of a summary judgment entered on Substantive Due Process, Equal Protection, and Due Process Takings claims brought pursuant to 42 U.S.C. § 1983, and to mandate a jury trial to consider the reasonableness of the local government's proffered justification in denying a DRI/Rezoning Application?

Whether *Del Monte Dunes* holds that there is a Due Process Takings claim cognizable under 42 U.S.C. § 1983, without the landowner first availing himself of a state postdeprivation remedy?

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## STATEMENT OF THE CASE

Florida law requires that certain proposed developments, such as the super regional mall proposed by Petitioners, undergo local, regional and state review pursuant to the provisions of § 380.06, Fla. Stat., prior to the initiation of any development. These proposed developments, known as "developments of regional impact" or "DRIs," require local, regional and state approval because they "would have a substantial effect upon the health, safety, or welfare of citizens of more than one county" due to their "character, magnitude or location." § 380.06(1), Fla. Stat.

Under § 380.06(14), Fla. Stat., a proposed DRI may be approved, denied, or approved subject to conditions, restrictions or limitations, by a local government. One of the statutory factors local government is required to consider is whether and to what extent the proposed development: "is consistent with the local comprehensive plan and local land development regulations." § 380.06(14), Fla. Stat.

The local comprehensive plan under which Petitioners' proposed DRI was reviewed was the Future of Hillsborough County Comprehensive Plan for the time frame through 2010 ("the 1989 Comprehensive Plan"). Pursuant to the requirements of Chapter 163, part II, Fla. Stat., Hillsborough County (the "COUNTY") adopted the 1989 Comprehensive Plan on July 12, 1989, which included classifying the Petitioners' property as Regional Commercial ("RC"). The RC future land use category was the only land use category under the 1989 Comprehensive Plan which allowed for consideration of a maximum retail component in excess of 300,000 square feet of development.

Petitioners' proposed DRI project also required rezoning from Agricultural Residential ("AR") to Planned Development — Mixed Use ("PD-MU") under the Hillsborough County Land Development Code (1992, as amended) ("LDC"). The General Review Criteria for a PD zoning district under the LDC are: (1) physical characteristics of the site and relation to surrounding property; (2) the density or intensity of the proposed development in relation to the surrounding land uses and zoning; (3) the relation of the PD district to public utilities, facilities and services; (4) the relation of the PD district to major transportation facilities; (5) compatibility of the PD district; (6) provision for gradual changes in density or intensity; (7) internal/ external relationship. LDC § 2.7.5.11.1.

**a. History of Petitioners' DRI and Rezoning Application**

Petitioners, Peter A. Geraci and Roy N. Geraci, ("Geraci") own property located in Northwest Hillsborough County, at the northeast quadrant of the intersection of Dale Mabry Highway and Van Dyke Road. All property sought to be developed was owned by the Geracis and parts of the property were, at times, under contracts for sale to Forbes-Cohen Development Corporation ("Forbes-Cohen") and Advance Leasing and Development, Inc. ("ALD"). For many years the property has been used for cattle operations.

On October 17, 1988, Forbes-Cohen filed an Application for Development Approval of a Development of Regional Impact ("DRI ADA"), for 1.3 million square feet of retail development on 215 acres of the Geracis' property. Forbes-Cohen never obtained approval from the Tampa Bay Regional Planning Council ("TBRPC") and never sought any decision by the COUNTY on the DRI ADA. Forbes-Cohen

abandoned the project in late 1989. The project was dormant in 1990 and 1991. On February 28, 1992, Petitioner, ALD, filed an "Update" to the Forbes-Cohen DRI ADA for a proposed mall (DRI No. 192), consisting of 1.28 million square feet of retail development on 194 acres of the Geracis' property (the "DRI Parcel"). On January 21, 1993, ALD submitted to the COUNTY a rezoning application, including a General Development Plan dated July 21, 1992, requesting a zoning change from AR to PD-MU on the DRI Parcel for 1.28 million square feet of development (RZ 93-170).

In April 1993, a noticed public hearing on DRI No. 192 and RZ 93-170 was held before the Hillsborough County Zoning Hearing Master ("ZHM")[1]. The ZHM recommended denial of Petitioners DRI and Rezoning application based upon numerous concerns, including inconsistency with the 1989 Comprehensive Plan, as prohibited by § 163.3194(1)(a), Fla. Stat., and inconsistency with the applicable zoning law. On May 14, ALD submitted several modifications to RZ 93-170 including an approval to provide 80 acres of offsite upland mitigation. On June 11, 1993, COUNTY staff wrote Petitioners about staff's concerns that certain parcels owned by the Geracis adjacent to the proposed mall site were not part of the DRI/RZ applications. Staff recommended a coordinated rezoning. On June 23, 1993, the Geracis filed a separate rezoning application for forty-two (42) acres located adjacent to the DRI parcel and fronting on Van Dyke Road and Dale Mabry Highway (the "Outparcels"). The rezoning

1. The COUNTY uses a ZHM to conduct a public hearing on DRI/RZ applications, and to make findings of fact and recommendations. *See* LDC Division 2.7. The ZHM makes its recommendation to the Hillsborough County Board of County Commissioners, which has the sole power to make a final decision on the applications. *Id.*

application requested a rezoning from AR to Planned Development-Commercial ("PD-C"), for 235,000 square feet of office development. The rezoning application was in addition to the DRI/RZ application filed by ALD.

On June 29, 1993, the ZHM held a second noticed public hearing on DRI No. 192 and RZ 93-170. On July 14, 1993, the ZHM recommended denial based on numerous concerns, including inconsistency with the 1989 Comprehensive Plan and the applicable zoning law; the proposed parcelization of Outparcels; failure to address impacts on wildlife habitat, wetlands and transportation; and incompatibility.

On September 3, 1993, Petitioners combined RZ 93-170 (for the DRI Parcel) and RZ 93-332 (for the Outparcels) into consolidated RZ 93-170, which the Petitioners called a "unified plan" on 271 acres. In October 1993, Petitioners revised their General Development Plan (dated September 3, 1993/revised October 21, 1993) for 1.28 million square feet of development on the DRI Parcel and 235,000 square feet of office development on the Outparcels.

On November 2, 1993, the ZHM held a third noticed public hearing on DRI 192 and RZ 93-170, under the revised General Development Plan. On November 17, 1993, the ZHM recommended approval of a reduced level of development consisting of 697,000 square feet on the southern half of the property under consideration, along with ten (10) conditions and restrictions on the General Development Plan.

On November 30, 1993, Petitioners again amended DRI 192 and RZ 93-170 to reduce the proposed project to a "phased" project in which only Phase One, consisting of 880,000 square feet of development, would receive specific

DRI approval. Further, Petitioners proposed that no development would be approved on the Outparcels and future proposed development would be subject to further DRI review and public hearings by the COUNTY.

On December 16, 1993, the Hillsborough County Board of County Commissioners ("BOCC") held a public hearing on DRI 192 and RZ 93-170, as amended on November 30, 1993. The BOCC accepted the ZHM recommendations except that the development would encompass the entire 274 acres. The BOCC conditionally approved the development of 697,000 square feet of development on 274 acres, subject to the Petitioners' revision of the General Development Plan to address the ten (10) conditions, in the November 17, 1993 ZHM recommendation. Petitioners submitted a General Development Plan (dated January 21, 1994/revised February 11, 1994) for 697,000 square feet of development on 274 acres. However, Petitioners failed to comply with the conditional approval set forth by the BOCC at its December 16, 1993 hearing.

On March 29, 1994, the BOCC held a second public hearing on DRI No. 192 and RZ 93-170. At the hearing, Petitioners presented the February 11, 1994 revised General Development Plan for 697,000 square feet of development. The BOCC denied the applications because the Petitioners again failed to comply with 2 of the 10 conditions set by the BOCC at its December 16, 1994 hearing.

On April 26, 1994, the BOCC held a public meeting (not hearing) for the sole purpose of formally adopting a denial resolution based upon the motion adopted on March 29, 1994. In accordance with § 380.06, Fla. Stat. the BOCC adopted Resolution 94-0102, denying the DRI/RZ

applications but enumerating changes that would make the development eligible to receive approval, which included those conditions in the November 17, 1993 ZHM recommendation. Consistent with § 380.06(14), Fla. Stat., the BOCC set out its reasons for denial in Resolution 94-0102, including lack of environmental protection, inconsistency with the character of the community, incompatibility, noncompliance with the Comprehensive Plan and the LDC, and transportation impacts.

Petitioners challenged the DRI/RZ denial by filing an Appeal Petition with the Florida Land and Water Adjudicatory Commission ("FLWAC"), pursuant to § 380.07, Fla. Stat., in June 1994 (the "DRI Proceeding").[2] The DRI Proceeding was a *de novo* proceeding by FLWAC on the DRI/RZ applications under which the COUNTY's denial was not entitled to a presumption of correctness. On June 19, 1998, Petitioners voluntarily withdrew/dismissed the DRI Proceeding. FLWAC issued a Final Order of Dismissal on July 29, 1998.

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2. Petitioners also filed a petition in the Circuit Court for Hillsborough County, Florida, for a Writ of Certiorari to quash the COUNTY's denial of Petitioners' RZ application. The petition was dismissed as not timely filed, and that dismissal was upheld by the Florida Second District Court of Appeals in *Advance Leasing & Development, et al. v. Board of County Commissioners*, Case No. 95-2718. Further, Petitioners filed a petition for vested rights against the COUNTY's significant wildlife habitat ordinance and concurrency regulations, which was denied by a county land use hearing officer. Petitioners appealed the land use hearing officer's denial to the BOCC, which affirmed the decision. The Hillsborough County Circuit Court denied Petitioners' Petition for Writ of Certiorari in *Advance Leasing & Development, et al. v. Hillsborough County*, Case No. 97-8568-A (R7-181-12) on August 24, 1998, finding that Petitioners had no vested rights. The Florida Second District Court of appeals also denied Petitioners' petition for Writ of Certiorari in Case No. 98-03651 on January 26, 1999.

**b. Challenges to County's 1989 Comprehensive Plan which relate to Petitioners' right to develop the Property**

On September 20, 1989, the Florida Department of Community Affairs filed a petition challenging the 1989 Comprehensive Plan of Hillsborough County as not in compliance, pursuant to § 163.3184(10), Fla. Stat., based in part upon the lack of appropriate data and analysis to support densities and intensities in the 1989 Comprehensive Plan. In this administrative proceeding a Recommended Order was entered which included the conclusion of law that the Comprehensive Plan's levels of densities and intensities in Northwest Hillsborough County were not supportable by data and analysis. The Geraci property was included within the area which was the subject of the administrative proceeding.

The Recommended Order was forwarded to the Florida Administration Commission ("FAC"), consisting of the Governor and Cabinet for final agency action. §§ 163.3184(9)(b) and (10)(b), Fla. Stat. The FAC entered its Final Order on December 16, 1993 ("the Final Order"). The Final Order recommended the following remedial actions for Area 3(c), which includes the Geracis' property: "the three (3) outparcels along Dale Mabry Highway and Van Dyke Road currently designated RC will be designated Commercial Office ("CO") . . . [and t]he main area currently designated RC with a FAR of 1.0 will be amended to designation of Urban Mixed Use* ("UMU*")." The Final Order found that the RC classification was not supportable by relevant and appropriate data and analysis, but the recommended remedial action was for guidance only.

The Final Order returned the Comprehensive Plan to the COUNTY for public hearings and a determination of appropriate land use classifications. The Planning Commission

recommended and the BOCC adopted by Ordinance No. 94-10 amendments, to the Future Land Use Map ("FLUM"), which changed the land use classification on 253 acres of the Geracis' property (including the DRI Parcel) from RC to CMU-12. The CMU-12 classification allows for consideration of development with up to a 0.5 FAR of which up to 650,000 square feet could be retail uses. On October 27, 1994, after additional hearings, the BOCC adopted CMU-12 for the Geracis' property.

The FAC retained jurisdiction to determine compliance of the COUNTY's Comprehensive Plan after the adoption of remedial amendments. On February 24, 1998, Petitioners filed a Notice of Violation of Agency Action with the FAC, alleging that the COUNTY's legislative action, which changed the land use classification on Petitioners' property, had violated the Final Order. On April 16, 1998, the Administration Commission issued a determination that the COUNTY acted consistent with the Final Order.

**c. Statement of Federal Court Case**

On January 13, 1995, Petitioners served its initial Complaint on the Defendants.[3] On August 21, 1995,

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3. Defendants are the COUNTY through its individual Commissioners serving on the Board of County Commissioners, the Secretary of the Department of Community Affairs for the State of Florida, and Jan Smith, individually and a member of the Hillsborough County Planning Commission. During the case there have been three Secretaries of the Department of Community Affairs-originally Linda Shelly was served, then replaced by James F. Murley, and currently this office is held by Steven S. Seibert. Jan Smith was voluntarily dismissed as a party from the case on June 4, 1998.

Petitioners filed an Eight Count Amended Complaint in which they claimed that the COUNTY improperly refused to grant rezoning and DRI development approval to enable them to construct a super regional mall and thereafter, with the approval of the Florida Department of Community Affairs, improperly down-planned their property in an amendment to Hillsborough County's Comprehensive Plan. In six Counts of the Amended Complaint Petitioners sought relief under 42 U.S.C. § 1983: Count I alleged an arbitrary and capricious due process claim, Count II alleged an equal protection claim that Petitioners were treated differently from other similarly situated landowners, Count IV alleged a due process takings claim, Count V alleged an impairment of contract claim, Count VI alleged a procedural due process violation, and Count VIII alleged a claim for preliminary and permanent injunctive relief. The Amended Complaint also contained State law claims. Count III alleged a claim for equitable estoppel and Count VII alleged a claim for specific performance. After three years in which the parties engaged in extensive discovery, on September 21, 1998, the District Court for the Middle District of Florida granted the Motions for Summary Judgment filed by the COUNTY and the Florida Department of Community Affairs on the § 1983 Counts and dismissed the State law Counts. On September 22, 1998, the District Court entered the Final Judgment against Petitioners. (App. B, Petitioners Petition for Writ of Certiorari).

On October 19, 1998, Petitioners filed a Notice of Appeal with the Middle District Court for Florida. On May 19, 2000, the Eleventh Circuit Court of Appeals affirmed the judgment entered by the Middle District Court of Florida. (App. A, Petitioners Petition for Writ of Certiorari). After Petitioners requested rehearing en banc on June 7, 2000, the Eleventh Circuit denied rehearing en banc on July 24, 2000. On August 8, 2000, the Eleventh Circuit Court of Appeals granted Petitioners' Motion for Stay of the Mandate.

## SUMMARY OF ARGUMENT

The decision by the Eleventh Circuit does not conflict with *Del Monte Dunes* or any other Federal appellate decision. The Eleventh Circuit's decision does not recite any facts or evidence and does not discuss legal principles. The Eleventh Circuit simply identified the issues which were presented on Respondents' Motion for Summary Judgment and affirmed the District Court's determination that Respondents were entitled to summary judgment.

The case before the Eleventh Circuit and the case decided by this Court in *Del Monte Dunes* deal with different subject matter. The issue before this Court in *Del Monte Dunes* was whether a landowner was entitled to a jury trial in a *takings* case. In the instant case, the Eleventh Circuit did not review a takings claim because Petitioners had not pursued to completion the postdeprivation remedy available to them in Florida. Therefore, Petitioners' takings claim was unripe. In *Del Monte Dunes* this Court noted that a takings claim under § 1983 had been allowed because California did not provide a postdeprivation remedy for the taking.

Petitioners contend that *Del Monte Dunes* eliminated the rational basis test which is used to determine whether governmental action is reasonably related to the achievement of some legitimate government purpose. The person asserting substantive due process or equal protection violations has the burden to negate every conceivable basis which might support the governmental action. There is not even a hint in *Del Monte Dunes* that this Court intended to eliminate or modify the rational basis test.

Whether *Del Monte Dunes* conflicts with decisions of the Eleventh Circuit other than the instant case is irrelevant. The only conflict between *Del Monte Dunes* and Eleventh Circuit cases is that in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1048 (11th Cir. 1986), the Eleventh Circuit held that a landowner was not entitled to a jury trial in a regulatory takings case.

There is nothing in *Del Monte Dunes* to suggest there has been any alteration of summary judgment standards. Petitioners were not entitled to either a bench or jury trial because Respondents were entitled to judgment as a matter of law.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I.

### THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *DEL MONTE DUNES*.

The decision by the Eleventh Circuit identifies this as a land-use controversy and specifies five issues. The Eleventh Circuit then concluded that there was no error in granting summary judgment for Defendants (Respondents). The Eleventh Circuit's decision does not recite any evidence or discuss any principle of law. Petitioners impute rulings and positions to the Eleventh Circuit which are not part of the written decision and that cannot even be inferred.

Supreme Court Rule 10 provides in part: "A petition for a writ of certiorari will be granted only for compelling

reasons." One possible reason would be that the Eleventh Circuit "has entered a decision in conflict with the decision of" this Court. There is simply nothing in the Eleventh Circuit's decision that shows any conflict with any court. In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S. Ct. 422 (1923), this Court said

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing conflict of opinion and authority* between the Circuit Courts of Appeals. *Id* at 393. (Emphasis added.)

The Eleventh Circuit, in the instant case, has said nothing to create any kind of conflict.

## II.

## CONTRARY TO *DEL MONTE DUNES*, THE ELEVENTH CIRCUIT DID NOT REACH THE MERITS OF A TAKINGS CLAIM IN THAT PETITIONERS CONCEDED THAT THEIR CLAIM WAS NOT RIPE FOR REVIEW.

In *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), this Court dealt with the *type* of trial to be held in a "takings case." The Eleventh Circuit, in the instant case, found summary judgment was proper. In *Del Monte Dunes*, this Court considered the right to jury trial on a "takings claim." If Petitioners did have a valid "takings claim," that claim would not be ripe for review in that Petitioners were not denied a post deprivation remedy in this cause.

In *Del Monte Dunes*, this Court reviewed whether a landowner was entitled to a jury trial as afforded by the Seventh Amendment on damage and liability issues arising from an uncompensated regulatory taking by the City. A claim under 42 U.S.C. § 1983 was allowed "because the State of California had not provided a compensatory remedy for temporary regulatory takings." 526 U.S. at 699. In *Del Monte Dunes* this Court did not review Substantive Due Process claims, Equal Protection claims, Procedural Due Process claims, standards for summary judgment, or a challenge to the jury instructions.

By contrast, the Eleventh Circuit did not reach the merits of the Petitioners Due Process Takings claim. The District Court noted in its Order that:

> Plaintiffs concede that their due process taking claim is no longer viable in light of *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997).

In *Villas* the Eleventh Circuit held that "[t]here is no substantive due process 'takings' claim that would protect the specific property right not already protected by the Takings Clause." 121 F.3d at 615. To reach this result the Eleventh Circuit relied upon *First English Evangelical Church of Glendale v. Los Angles County*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to find that a non-physical takings claim is properly redressed by only the Just Compensation Clause. Thus, the Eleventh Circuit in *Villas* determined, prior to this Court's decision in *Del Monte Dunes*, that

> . . . [r]ecent Supreme Court "takings" jurisprudence and the well established contours of substantive due process law dictate that if a challenge to a "regulatory

> taking" states a claim upon which relief may be granted at all, it is a cause of action under the Takings Clause, subject to the ripeness prerequisite of exhaustion of the state-court inverse condemnation remedy. *Villas*, 121 F.3d at 612.

The import of *Villas* is that there is no "unconstitutional taking" until the landowner has been denied just compensation, which principle was expressly described in *Del Monte Dunes*. This Court recognized that

> The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the City paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. *Del Monte Dunes*, 526 U.S. at 710.

Petitioner, in the case at bar, has not suffered a "constitutional injury" even if there was a taking because there is a postdeprivation remedy available in Florida. Petitioners have not availed themselves of this postdeprivation remedy, and therefore, Petitioners had no claim for unconstitutional taking to be presented to the Eleventh Circuit. Petitioners acknowledged in the record before the District Court that they had failed to pursue to completion their postdeprivation remedy:

> [REQUEST] 63. No Plaintiff has pursued to completion any inverse condemnation claim based upon any alleged taking by HILLSBOROUGH COUNTY, FLORIDA.

> [RESPONSE] 63. Denied, in that the Plaintiffs have filed, and are pursuing to completion an inverse condemnation claim in state Court based upon an alleged taking by Hillsborough County, Florida, without just compensation pursuant to the Florida Constitution. That matter is pending and will be pursued to completion. It is admitted that Plaintiffs have not pursued to completion any inverse condemnation takings claim based upon the Fifth Amendment to the United States Constitution, as that claim will not be ripe for adjudication by the United States District Court until such time as Plaintiffs have pursued to completion their inverse condemnation claim based upon the Florida Constitution.

(Amended Response to Request for Admissions served March 16, 1998) (DKT 236).

The lawsuit referred to in response to request number 63 was not filed until about November 19, 1997, or more than two years after the Complaint was filed in the District Court. Florida provides an adequate postdeprivation remedy. *See, e.g., Reheard v. Lee County*, 30 F.3d 1412, 1417 (11th Cir. 1994) (Florida has allowed an action for inverse condemnation for a temporary taking since 1990), *citing to Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). Thus, *Del Monte Dunes* is legally distinguishable from the case at bar because Petitioners have no takings claim in that Florida provides an adequate postdeprivation remedy, and because Petitioners could not create a genuine issue of fact to warrant a trial.

## III.

## PETITIONERS' CLAIM THAT *DEL MONTE DUNES* ELIMINATED THE RATIONAL BASIS TEST IS UNFOUNDED.

In their Point I, Petitioners' claim that *Del Monte Dunes* "limited the District Court's deference in examining land-use denials in a manner that fundamentally conflicts with the 'hypothetically possible' precedent established in the Eleventh Circuit (and others) and applied in this case." (Petitioners Petition for Writ of Certiorari at p. 9). What Petitioners' are calling the "hypothetically possible" precedent is customarily referred to as the "rational basis" test. The decision of the Eleventh Circuit in the instant case says nothing about any test whatsoever.

The rational basis test is applied generally in evaluating Substantive Due Process/Arbitrary and Capricious claims, and Equal Protection claims. The rational basis test holds that the governmental agency is entitled to prevail on these claims if its action is reasonably related to the achievement of some legitimate governmental purpose. The person challenging the governmental action has the burden to negate every conceivable basis which might support the governmental action. Petitioners argue that *Del Monte Dunes* "has discredited this impermissibly deferential standard imposed by the Eleventh Circuit" in *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819 (11th Cir. 1998), *Haves v. City of Miami*, 52 F.3d 918 (11th Cir. 1995). *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1211 (11th Cir 1995) (Petition for Writ of Certiorari at p. 12).

These Eleventh Circuit cases are following faithfully the pronouncements of this Court, including *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d. 211 (1993), which held that "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it." 508 U.S. at 314.

There is no suggestion whatsoever in *Del Monte Dunes* that the rational basis test was supplanted or even changed, and such a change cannot be inferred. The rational basis test is well established in most, if not all, Circuits. Certainly there was no intent by this Court to eliminate the rational basis test and substitute in its place the proposition that the reasonableness of governmental action must always be presented to a jury. In *Del Monte Dunes*, the City had sponsored the jury instructions, the jury instructions were never challenged, and the propriety of the jury instructions were not considered by this Court. *See Del Monte Dunes*, 526 U.S. at 704.

## IV.

## *DEL MONTE DUNES* DOES NOT CONFLICT WITH DECISIONS OF THE ELEVENTH CIRCUIT EXCEPT ON THE RIGHT TO A JURY TRIAL IN "TAKINGS" CASES

Respondents submit that the only Eleventh Circuit decision that is relevant on this Petition is the decision rendered in this case. The question is not whether some other decision of the Eleventh Circuit might be in conflict with *Del Monte Dunes*.

*The Posture of Del Monte Dunes in This Court*: As considered by this Court, *Del Monte Dunes* was a claim pursuant to 42 U.S.C. § 1983 that the City's action constituted an uncompensated regulatory taking in violation of the Takings Clause. The District Court had afforded the landowner a jury trial on the issues of liability and damages on the claim of an uncompensated regulatory taking.[4] The case was under § 1983 "because the State of California had not provided a compensatory remedy for temporary regulatory takings." 526 U.S. at 698.

*Issues Decided By This Court in Del Monte Dunes*: The first issue was whether a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. This court held that it was and that the Plaintiff was entitled to a trial by jury.

The second issue was to "determine whether the particular issues of liability were proper for determination by the jury." 526 U.S. at 718. The Court held "that the issue whether a landowner has been deprived of all economically viable use of its property is predominantly a factual question" for the jury. 526 U.S. at 720. Also, this Court considered the "jury's role in determining whether a land-use decision substantially advances legitimate public interest *within the meaning of our regulatory takings doctrine*." (Emphasis added.) 526 U.S. at 720. The Court noted that this presented a more difficult question. The important items here are that this issue was presented "within the meaning of our regulatory takings doctrine," and within the particular context and circumstances of the case.

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4. The District Court decided Del Monte Dunes' Substantive Due Process claim without submitting it to a jury.

In *Del Monte Dunes* this Court did not deal with:

1. Substantive Due Process claims.
2. Equal Protection claims.
3. Procedural Due Process claims.
4. Standards for summary judgment.
5. Propriety of jury instructions.

Respondents concede that *Del Monte Dunes* conflicts with *New Port Largo Inc. v. Monroe County*, 95 F.3d 1048 (11th Cir. 1986), with regard to whether a landowner is entitled to a jury trial as opposed to a bench trial in a regulatory takings case. In the instant case, Petitioners were not entitled to a trial of any kind because Respondents were entitled to summary judgment. The conflict between *Del Monte Dunes* and *New Port Largo* is irrelevant to the Petition and to the decision of the Eleventh Circuit in the instant case. Petitioners may not use conflicts unrelated to the instant case to create conflict jurisdiction.

Petitioners assert that the Fifth Circuit in *John Corporation v. The City of Houston*, 214 F.3d 573 (5th Cir. 2000), rejected the Eleventh Circuit's position on takings cases (Petitioners' Petition for Writ of Certiorari at p. 20). Petitioners are incorrect. *Villas* did not hold that *all* Substantive Due Process claims are subsumed by the Takings Clause. *John Corporation* is consistent with *Villas*. *John Corporation* held that a landowner could not bring a § 1983 takings claim and bypass an available state postdeprivation remedy because the Takings Clause is only violated when just compensation has been denied. All of John Corporation's takings claims were dismissed as "unripe" for this reason. The Fifth Circuit noted that some Circuits hold that the Takings Clause subsumes all Substantive Due Process claims relating to deprivation of property.

In the instant case, Respondents did not contend on summary judgment and the District Court did not hold that the Takings Clause subsumed Petitioners' Substantive Due Process/ Arbitrary and Capricious, Equal Protection or Procedural Due Process claims. Moreover, only Petitioners' takings claim was deemed unripe; all other § 1983 claims were deemed ripe and were considered on their merits.

## V.

## *DEL MONTE DUNES* DOES NOT ALTER OR EVEN CONSIDER THE TRADITIONAL SUMMARY JUDGMENT STANDARDS AND SUMMARY JUDGMENT WAS WARRANTED BECAUSE PETITIONERS FAILED TO ESTABLISH ISSUES OF MATERIAL FACT IN THEIR CLAIMS FOR SUBSTANTIVE DUE PROCESS, AND EQUAL PROTECTION WHICH ARE UNRELATED TO THE REASONABLENESS OF THE DENIAL OF PETITIONERS' DRI/REZONING APPLICATION

Petitioners assert that *Del Monte Dunes* affirms "the right of each citizen to a jury trial to review the merits of a land use denial." (Petitioners Petition for Writ of Certiorari at pp. 9-10) Under this argument, *Del Monte Dunes* would nullify long-standing summary judgment principles and always require a jury trial to determine whether the government's action had a rational basis. This argument is meritless, as reasoned by the Third Circuit in *Buckles v. Kings County*, 191 F.3d 1127, 1141 (3rd Cir. 1999) since *Del Monte Dunes* did not alter or even consider the traditional summary judgment principles.

Summary judgment was warranted on the Substantive Due Process and on the Equal Protection claims on grounds not set forth in the Petition for Writ of Certiorari. Regardless

of the reasonableness of the government's proffered justifications, summary judgment for Respondents would still be required on each of these claims. As determined in the District Court's Order, the claim for Substantive Due Process was deficient because the Plaintiffs lacked a vested property interest to support this claim since the Plaintiffs did not have "a vested right to the redesignation of their property, under an estoppel or any other theory." Similarly, the Equal Protection claim was deficient since the "[p]laintiffs have not provided a single instance in which a similarly situated claim was treated differently," and Plaintiffs "fail to explain how projects referenced in the record were similarly situated to that of Plaintiffs." Finally, as noted above, any takings claim could not be entertained by the District Court because Petitioners have not pursued to completion their Florida postdeprivation remedy. Summary judgment for respondents was proper notwithstanding Petitioners' interpretation that *Del Monte Dunes* eliminated the rational basis test.

## CONCLUSION

This Court should deny Petitioners' Petition for Writ of Certiorari because Petitioners have failed to present an important question to this Court which this Court must decide. Petitioners have misconstrued the decision of the Eleventh Circuit Court of Appeals in this matter and have misinterpreted this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). After a review of the decision of the Middle District Court of Florida, which was upheld by the Eleventh Circuit Court of Appeals, it is clear that the lower courts committed no error in granting summary judgement against Petitioners. Further, the Eleventh Circuit Court of Appeals decision is not in conflict with this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Therefore, this Court should determine that Petitioners have not presented a compelling question.

Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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